JUN 29 1966
JOHN F. DAVIS, CLERK

SUPREME COURT, U.S.

NO. [redacted] 109

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM KIRVIN BARLOW,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

MOTION TO DISMISS OR AFFIRM

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

T. B. WRIGHT
Executive Assistant
Attorney General

HOWARD M. FENDER
Assistant Attorney General

CHARLES B. SWANNER
Assistant Attorney General

Attorneys for the Respondent

Box R, Capitol Station
Austin, Texas 78711

NO. 1235

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM KIRVIN BARLOW,

Petitioner

VS.

THE STATE OF TEXAS,

Respondent

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MOTION

The Supreme Court of The United States does not have jurisdiction of this appeal and no substantial federal question is presented.

OPINION BELOW

The Opinion is attached to Appellant's Brief.

JURISDICTION

The Court has no jurisdiction for the reason that Article 802b, Vernon's Annotated Penal Code, is valid

on its face and is not repugnant to the Constitution. The decision below decided merely that the Texas procedure in proving convictions thereunder was valid.

QUESTION PRESENTED

Whether or not a conviction for the second offense of Driving While Intoxicated, a felony, is invalid by reason of the State's having proved to the jury the prior misdemeanor offense of Driving While Intoxicated, when, before trial, the State offered with Defendant to remove such proof from the jury if the Defendant would stipulate such prior conviction, and where such prior conviction was necessary to confer jurisdiction upon the Court to try the offense.

STATEMENT

Appellant's statement is correct as far as it goes. Appellant has, however, neglected to inform us that prior to the commencement of the trial, one of the prosecutors, James B. Zimmerman, had a conversation with Defendant's attorneys, Paul W. Wisdom, Jr. and Paul H. Stanford, as to whether they wished to stipulate the Defendant's prior misdemeanor conviction as alleged in the second paragraph of the indictment so that proof of same would not be required to be read to the jury, for jurisdictional purposes. Both attorneys refused to so stipulate (TR. 21-24). Following the refusal to stipulate, the prior conviction was proved by the testimony of the attorney who had represented Appellant at the time of his previous conviction. In addition, Appellant himself admitted, while testifying in his own behalf, that he had been so previously convicted. (S.F. 142-143).

ARGUMENT

The Appeal should be dismissed and the Judgment of the Court of Criminal Appeals of Texas affirmed in view of the State's offer to stipulate.

Article 802b of Texas Penal Code is known as the Driving While Intoxicated, "second offense" statute. In Texas, driving while intoxicated, first offense, is merely a misdemeanor and as such cannot be tried in the District Courts, but must be tried in inferior courts having misdemeanor jurisdiction. Thus, allegations and proof of a prior conviction for driving while intoxicated are necessary to give jurisdiction to the District Courts, and; accordingly, since these allegations and proof are jurisdictional rather than for purposes of enhancement of punishment, as is the fact in the cases cited by Petitioner, i.e., *Robert A. Bell vs. Texas,* 128, Misc.; *Leon Spencer vs. Texas,* 273, Misc. and *Walter Everett Reed vs. Beto,* 268, Misc., the facts of the instant case may be distinguished therefrom.

Had the State not proceeded with proof of the conviction, the District Court would have been without jurisdiction and a motion for instructed verdict would have been granted. In addition, of course, Appellant waived any defects in the procedure by admitting same in his own testimony.

On prior occasions, the Court has expressed interest in what effect, if any, the revision of the Code of Criminal Procedure of Texas might have upon such allegations and proof. In passing, we would point out to the Court that the new Code of Criminal Procedure makes no change in such matters when prior convictions are alleged, not for purposes of enhancement, but

for purposes of conferring jurisdiction. Thus even today in a prosecution under Article 802b, the portion of the indictment alleging prior misdemeanor convictions must be read to the jury or stipulated. See Article 36.01 of the Texas Code of Criminal Procedure (1965).

CONCLUSION

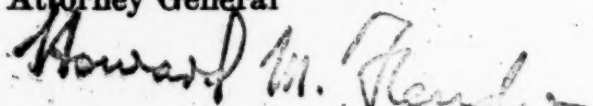
For the above reason this Motion to Dismiss or Affirm should be granted.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

T. B. WRIGHT
Executive Assistant
Attorney General



HOWARD M. FENDER
Assistant Attorney General

CHARLES B. SWANNER
Assistant Attorney General

Attorneys for the Respondent

Box R, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Howard M. Fender, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that a copy of the foregoing Motion to Dismiss or Affirm has been forwarded by United States Mail, First Class, Postage Prepaid, to Alto B. Cervin, Counsel for Petitioner, 1040 Republic National Bank Building, Dallas, Texas, this the 28 day of June, 1966.

Howard M. Fender

Assistant Attorney General

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

BARLOW *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 109. Decided February 13, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS would reverse the judgment of the court below for the reasons stated in the dissenting opinion of THE CHIEF JUSTICE in *Spencer* v. *Texas*, 385 U. S. ——.